

2022 MID-YEAR LABOR & EMPLOYMENT SEMINAR



Eyes Wide Shut: Seeing Past Unconscious Bias



Jennifer Martinez

Chief Diversity, Equity & Inclusion Officer

T: 415-995-5842

jmartinez@hansonbridgett.com



What We'll Cover

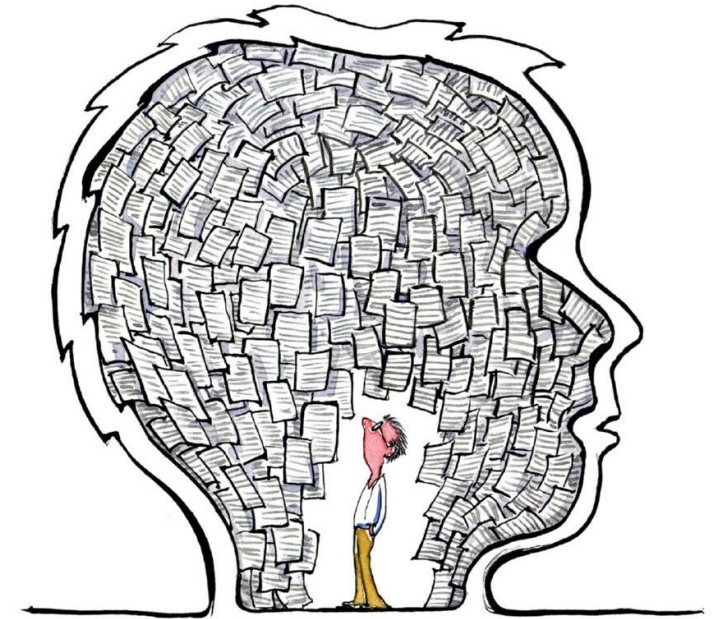
- Discuss the definitions, terms, and concepts of implicit/unconscious bias
- Examine relevant research findings on bias
- Review factors that contribute to bias
- Review how bias impacts workplaces
- Techniques for mitigating bias

But First...



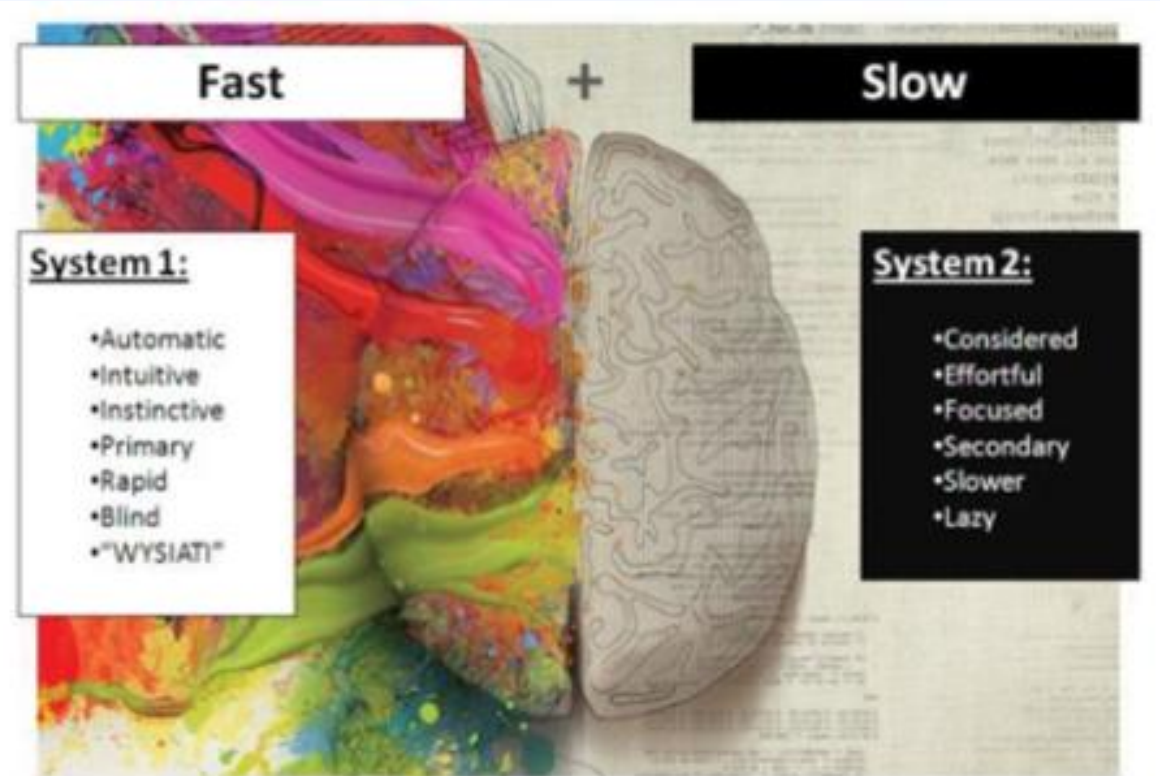
Implicit Bias Defined

- Implicit bias is “a positive or negative mental attitude towards a person, thing, or group that a person holds at an unconscious level.”
 - Source: http://med.stanford.edu/diversity/FAQ_REDE.html
- Implicit bias is the process by which the brain “uses mental associations that are so well-established as to operate without awareness, or without intention, or without control.”
 - Source: Project Implicit, Harvard University, <https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq2>
- Contrast with explicit bias, which is attitudes and beliefs we have about a person or group on a conscious level



Implicit Bias Defined

- The human brain is hard-wired to make decisions rapidly, drawing on our prior experiences and knowledge/assumptions without our awareness
- Without involvement/awareness by our conscious brain, we are constantly making rapid and immediate generalizations about people, places, and things we encounter



Try This!

RED

GREEN

BLUE

PURPLE

YELLOW

BLUE

YELLOW

PURPLE

GREEN

RED

SKY

GRASS

DIRT

SUNSHINE

STOP SIGN

SKY

GRASS

DIRT

SUNSHINE

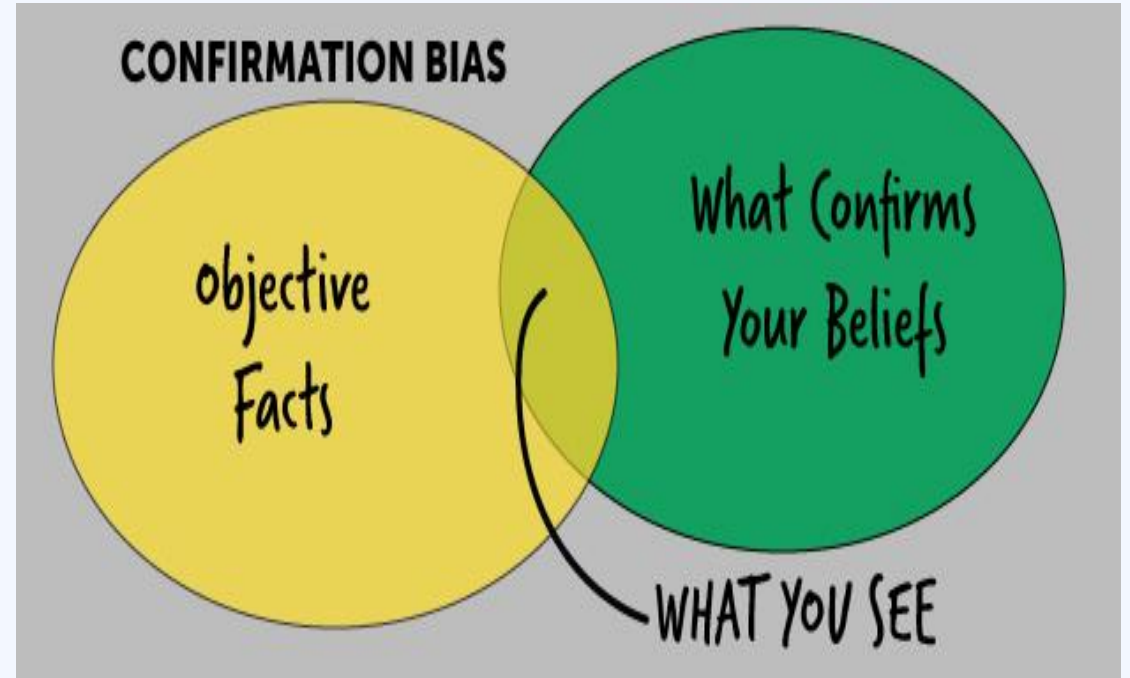
STOP SIGN

Implicit Bias Defined

- Additional influential factors:
 - Personal or traumatic experiences
 - Family and upbringing
 - Education
 - Association with diverse groups
 - Awareness of relevant issues
 - Media

Implicit Bias Defined

- A lot of implicit bias is really about a combination of affinity bias and confirmation bias
 - Affinity = favoring our family members, members of our own community, and people with whom we feel a connection based on shared characteristics or experiences
 - Confirmation = tendency to search for or interpret new information in a way that confirms your preexisting beliefs



Key Characteristics of Implicit Bias

- Implicit biases are universal and pervasive
- We all hold significant biases that favor our own in-group
- Often our implicit/unconscious biases do not align with, or are directly contrary to, our conscious beliefs and values
- Bias can include implicit beliefs (stereotypes) and implicit attitudes (prejudice)
- Most importantly: implicit biases are malleable and we can do a lot to guard against bias creep

Types of Implicit Bias

- **Prove-it-again bias** - tendency to judge women/POC on performance (mistakes noticed more/remembered longer), while white men judged on potential
- **Tightrope bias** - tendency to allow a narrower range of “acceptable” workplace behavior from women and people of color.
- **Recency bias** - tendency to focus on recent time period instead of total time period
- **Primacy bias** - tendency to emphasize information learned early on over information encountered later
- **Halo effect bias** - tendency to allow one good or bad trait to overshadow others
- **Centrality bias/leniency bias** - tendency to rate in the middle of a rating scale
- **Idiosyncrasy bias** - tendency to evaluate skills you’re not good at highly and the tendency to evaluate skills you’re great at with a harsher standard

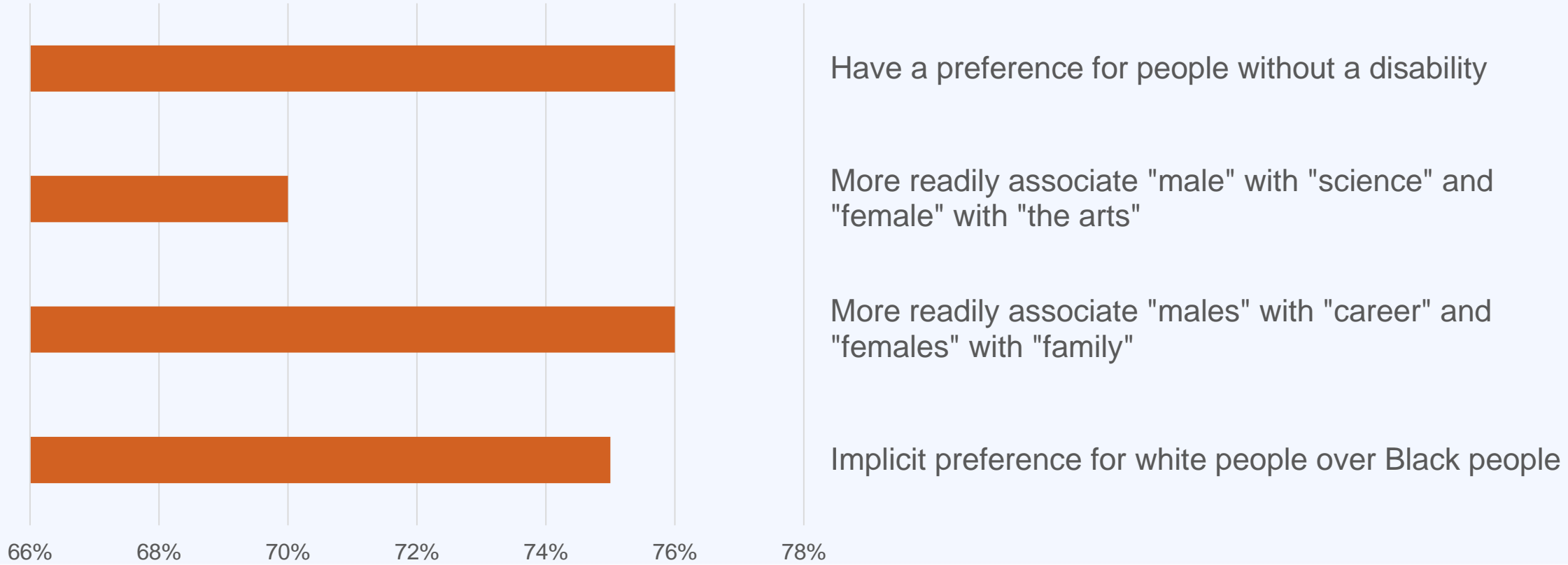
Common Riddle

A father and his son are in a car accident. The father dies at the scene and the son is badly injured and rushed to the hospital. When he gets in the operating room, the surgeon takes one look at the boy and refuses to operate, saying “I can’t operate on this boy. He is my son.”

How is this possible?

The Data on Implicit Bias

Source: Harvard Implicit Association Test, <https://implicit.harvard.edu/implicit/selectatest.html>



More Data on Implicit Bias

- Immigrants with the lightest complexions earned about 8 to 15 percent more than those with the darkest skin tone. “Being one shade lighter has about the same effect as having an additional year of education.”
 - *Source: Joni Hersch, Vanderbilt University*
- Black boys as young as 10 are more likely to be mistaken as older and be perceived as guilty if accused of a crime than white boys.
 - *Source: Phillip Atiba Goff, The Essence of Innocence: Consequences of Dehumanizing Black Children, Journal of Personality and Social Psychology*

More Data on Implicit Bias

- In the U.S., one inch of height is worth \$789 per year in salary.
 - *Source: Malcolm Gladwell, Blink*
- Job applicants with traditionally “white” names were called back approximately 50% more often than job applicants with traditionally African-American names, regardless of industry or occupation.
 - *Source: Bertrand and Mullainathan (2003)*
- In orchestra auditions, using a screen to conceal musicians’ appearance from the evaluators increased the likelihood that a female musician would be hired by 11-45%.
 - *Source: Goldin and Rouse (2000)*

More Data on Implicit Bias

- Harvard Study on Evaluation of Law Firm Associate Writing
- Researchers created a memo from a hypothetical third year litigation associate that focused on the issue of trade secrets in internet start-ups. They deliberately inserted 22 different errors, 7 of which were minor spelling/grammar errors, 6 of which were substantive technical writing errors, 5 of which were errors in fact, and 4 of which were errors in the analysis of the facts in the Discussion and Conclusion sections.
- Memo was distributed to 60 partners from 22 different law firms, of whom 23 were women, 37 were men, 21 were racial/ethnic minorities, and 39 were white.
- While all partners received the same memo, half the partners received a memo that stated the associate was African American while the other half received a memo that stated the associate was Caucasian.

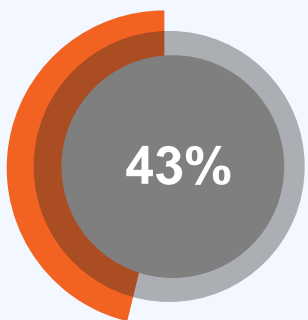
More Data on Implicit Bias – Harvard Study (cont.)

- Average overall score of 3.2/5.0 for memo by Black associate vs. overall 4.1/5.0 score for the white associate
- Average 2.9/7.0 spelling/grammar errors found in white associate's memo vs. 5.8/7.0 spelling/grammar errors found in Black associate's memo
- Average of 4.1/6.0 technical writing errors found in white associate's memo vs. 4.9/6.0 technical writing errors found in Black associate's memo
- Average of 3.2/5.0 errors in facts found in white associate's memo vs. 3.9/5.0 errors in facts found in Black associate's memo
- No significant correlation between a partner's race/ethnicity or gender and the differentiated patterns of errors found between the two memos

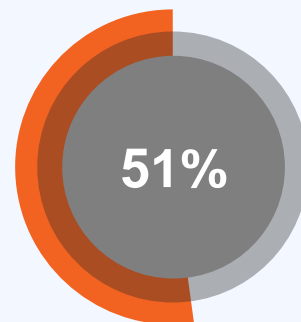
Effect of Bias in Professional Life

- The judgments we form about individuals (co-workers, clients, witnesses), situations, and circumstances that are based on stereotypes
- Interpretation of behavior (e.g., HR investigations)
- Employee interactions and employee satisfaction
- Recruitment, hiring, offer terms, onboarding
- Team and project assignments
- Performance evaluations, disciplinary actions, personnel decisions
- Client or customer service
- Openness to new ideas and innovative solutions

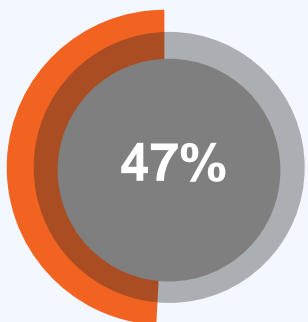
Demographic Shifts in General



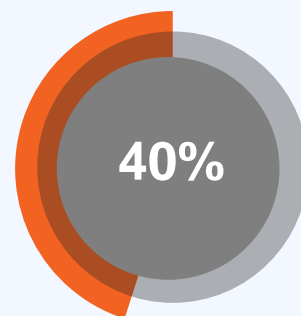
43 percent of millennials are people of color, and each ensuing generation is even more diverse



By about 2043, America will become a majority people of color nation, with more than half its population non-White




Generation Z (born 1996–2010) is 47 percent Latinx, African-American, Asian-American, or multiracial



Since about 2000, a higher percentage of women have obtained college degrees than men (the rate is currently ~40% to ~33%)

Despite these numbers, management and c-suite executive positions still predominantly straight, white, male → creates opportunity for implicit bias creep



“Self, situational, or broader cultural interventions can correct systematic and consensually shared implicit bias.”

Fair Measures, California Law Review, Jerry Kang and Banaji

Why Addressing Bias Is Crucial

- Individual Implicit Biases Have Systemic Effects
- The “systems” or “structures” in “structural racism” or “systemic bias” are ultimately an accumulation of individual biases
 - E.g., disparities in criminal justice
 - E.g., medical treatment and outcomes
- Biases affect whether and how we recognize “social problems” as such
- Biases influence our diagnoses of the causes and solutions of these social problems

Strategies to Address Implicit Bias

Bias Is Universal



Recognize that bias is universal. Everyone has biases about everything. Having bias or recognizing that you have bias does not make us bad people.

Bias Is Harmful and Fixable



While bias is incredibly common, it is also has incredibly harmful (albeit unintended) effects. We should accept the challenge to work on counteracting the biases that we all have.

Mitigation Requires Consciousness and Intentionality



Start with deliberate, conscious efforts to incorporate inclusiveness in our business decisions and in our everyday workplace interactions.

Strategies to Address Implicit Bias



**RECOGNIZE
AND
IDENTIFY**



**DISSECT AND
ADDRESS**



**GUARD
AGAINST**

Recognize and Identify

- Become aware of bias, individual perceptions, prejudices, stereotypes, and their impact on decision making
 - Bias priming – intentionally thinking about how implicit bias exists and works before making a decision
- Individuation – move beyond identity categories by intentionally becoming aware of and gathering specific information about an individual
 - Empowers personal/individual judgments rather than judgments based on group characteristics

Dissect and Address

- Stereotype replacement
 - Acknowledge the stereotype/bias in the situation
 - Evaluate to determine how portrayal occurred and how it might be prevented in the future
 - Replace the stereotypical portrayal with one that is non-stereotypical
- Counter-stereotypic imaging
 - Think of examples of people (even famous people!) that show stereotype to be inaccurate
 - Key for demonstrating inaccuracy of stereotypes
- Perspective taking
 - Imagine what it feels like to be in another person's situation
 - Think about how you would feel to have your abilities questioned, or to be viewed some way on the basis of your appearance

Guard Against

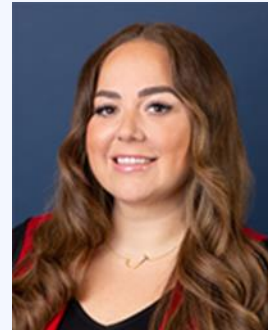
- Actively seek out situations where you are likely to have in-depth interactions with stereotyped groups and their cultures
- Engage in opportunities to learn about diverse cultures – clubs/activities, events, media (tv, film, books), social media
- Get to know colleagues as individuals; actively suspend prior judgments
- Be open to difficult conversations that might increase knowledge/awareness or challenge negative perceptions, stereotypes, and attitudes

Harvard Implicit Association Test

<https://implicit.harvard.edu/implicit/>

Questions?

Thank you for attending this program, for further information regarding this topic please reach out to:



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Chief Diversity, Equity & Inclusion Officer

T: 415-995-5842

jmartinez@hansonbridgett.com

The Future of Employment Arbitration Agreements; New Wage and Hour Class and PAGA Decisions



Josue Aparicio
T: 415-995-5094
JAparicio@hansonbridgett.com



Winston Hu
T: 415-995-6483
WHu@hansonbridgett.com



Maribel Lopez
T: 415-995-6332
MLopez@hansonbridgett.com



The Basics

- **Arbitration:** An alternative method of resolving legal disputes outside of traditional litigation/court proceedings.
- **Employment Arbitration Agreements:** A contract (or a clause in a contract) in which two parties agree to resolve certain disputes arising out of the Parties' employment relationship through binding arbitration.



Why Do I Need An Arbitration Agreement With My Employees?

- A well-written arbitration agreement can significantly reduce the risk of class actions.
- A well-written arbitration agreement can significantly reduce the risk of class actions.
- A well-written arbitration agreement can significantly reduce the risk of class **and PAGA** actions.



Emphasis On *Well-Written* ...



- The scope of employment disputes subject to arbitration.
- Class and Representative Action Waivers.
- Severability Clauses.
- Claims and classes of workers exempt from arbitration.
- Invalid and/or unconscionable terms.

Emphasis On *Well-Written* ...

- The FAA requires that courts enforce an arbitration agreement ***in accordance with its terms***.
 - 1) Whether a valid agreement to arbitrate exists and, if it does;
 - 2) Whether the agreement encompasses the dispute at issue.
- Employment arbitration agreements in California have 5 minimum requirements:
 - 1) Neutral Arbitrator(s);
 - 2) More than minimal discovery;
 - 3) A written arbitration decision (essential findings and conclusions);
 - 4) Allows all types of relief available in court (*i.e.*, punitive damages, fees, costs, etc.);
 - 5) Employees not to pay unreasonable costs and arbitrators' fees.

Class Action Waivers

- “Employee and the Company shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.”
- “The Arbitrator may not consolidate the claims of more than one person or entity and may not preside over any form of representative or class proceeding.”
- A cautionary tale – *Garner v. Inter-State Oil Company* (2020) 52 Cal.App.5th 619:

“To resolve employment disputes in an efficient and cost-effective manner, you and Inter-State Oil Co. agree that any and all claims arising out of or related to your employment that could be filed in a court of law, including but not limited to, claims of unlawful harassment or discrimination, ... ***or class action shall be submitted to final and binding arbitration, and not to any other forum.***”

Are My Transportation Workers Exempt From Arbitration?



Southwest Airlines Co. v. Saxon (June 6, 2022)

142 S.Ct. 1783

- Plaintiff Latrice Saxon was a Ramp Supervisor for Southwest Airlines.
 - Ramp agents load/unload cargo on/off airplanes.
 - Saxon supervised agents and frequently loaded/unloaded cargo alongside ramp agents.
- Employment contract contained arbitration clause and class action waiver.
- Filed class action alleging OT violations.
- Southwest filed motion to compel Saxon's claims to arbitration.



The “Transportation Worker” Exemption

- Section 1 of the Federal Arbitration Act:
 - “... but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, ***or any other class of workers engaged in foreign or interstate commerce.***”
- Saxon argued that because the air transportation industry engages in interstate commerce, *all* airline employees are exempt.
- Southwest argued that only workers who physically transport goods across foreign or international boundaries are “engaged in interstate commerce.”

SCOTUS Holds Airline Cargo Workers Are Exempt

“... or any other class of workers engaged in foreign or interstate commerce.”



- **“Class of Workers”**
 - By referring to “workers” rather than “employees,” FAA emphasizes “the performance of work.”
 - Saxon is therefore a member of a “class of workers” based on ***what she frequently does at Southwest*** (loading/unloading cargo on/off airplanes) and ***not on what Southwest does generally***.
- **“Engaged in Foreign or Interstate Commerce”**
 - Exemption applies to any class of workers “directly involved in transporting goods across state or international borders.”
 - The loading/unloading of an interstate shipment is ***so closely related to interstate transportation*** as to be practically a part of it.

Employer Takeaways

- Applies only to employees involved in the interstate transportation of goods or passengers. (Truck drivers, bus drivers, etc.)
- How far removed from interstate transportation can an employee be?
 - SCOTUS did not consider whether *supervision of cargo alone* would suffice.
 - How about Supervisors, Dispatch Managers or Customer Service Representatives?
- *Intrastate* transportation of goods?
 - Amazon Delivery Drivers.
- **Reminder:** California Arbitration Act applies in absence of FAA's authority.



May I Enforce Arbitration Agreement On PAGA Plaintiff?



Viking River Cruises v. Moriana (June 15, 2022)

142 S.Ct. 1906

“There will be no right or authority for any dispute to be brought, heard **or arbitrated as a class, collective, representative or private attorney general action**, or as a member in any purported class, collective, representative or private attorney general proceeding, including, without limitation, uncertified class actions (“Class Action Waiver”); provided, however, that you may opt out of the Class Action Waiver by clicking this box [] before you click below to acknowledge this TCA.”



Plaintiff Angie Moriana signed an arbitration agreement, containing representative action waiver.

Viking River Cruises v. Moriana (June 15, 2022)

142 S.Ct. 1906 (Continued)



- “**Severability Clause**” provided that if PAGA waiver is invalid in some respect, any “portion” of the waiver remaining valid must still be “enforced in arbitration.”
- Moriana did not opt out and filed a PAGA-only action in court.
- Viking moved to compel arbitration of Moriana’s “**individual**” PAGA claim.

PAGA Prior To *Viking River Cruises v. Moriana*

Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348

- **No individual component to PAGA claim that could be compelled to arbitration.**
 - The State is always the “real party in interest.”
 - PAGA gives employees a right to assert the State’s claims as agent or proxy, *but does not create private rights or private claims for relief.*
 - Allowing individual PAGA claims to be arbitrated did not serve PAGA’s purpose.
- **Representative PAGA Waivers are contrary to public policy and unenforceable as a matter of law.**
 - *Iskanian* held this rule was not preempted by the FAA.
 - FAA governs controversies “arising out of” a contract between the Parties.
 - PAGA is a dispute between the employer and the State.

SCOTUS Holds PAGA Contains Individual Component That Can Be Compelled To Arbitration

- **PAGA has individual component that can be compelled to arbitration.**
 - The FAA preempts the *Iskanian* Rule that precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.
 - The *Iskanian* Rule restricts the freedom of contracting parties to determine “the issues subject to arbitration” and “the rules by which they will arbitrate.”
- **Representative PAGA Waivers—waivers purporting to waive “Representative” PAGA claims—are *NOT* preempted by the FAA.**
 - “Severability clause” “severs” invalid provision to compel arbitration of Plaintiff’s individual PAGA claim.
- **PAGA Plaintiff loses statutory standing once individual PAGA claim is in arbitration.**
 - Dismissed *non-individual* PAGA claim once *individual* claim is compelled to arbitration.

Employer Takeaways

- *Viking River Cruises* is a win for employers.
- Employers can enforce individual PAGA claim through PAGA waiver in arbitration agreements.
- Severability Clause may be necessary to avoid a finding that “representative” PAGA waiver is unenforceable.
- Remains to be seen how California Courts will apply and interpret *Viking River Cruises* (or how the California legislature might respond).
- Employers should revisit current arbitration agreements.



Do I Need To Revise My Arbitration Agreement?

A cautionary tale courtesy of the Los Angeles Superior Court

Singh v. West Covina Motor Group LLC, Case No. 21STCV41713 (July 13, 2022)

Example #1

“I am agreeing to waive any substantive or procedural rights that I may have to bring or participate in an action brought on a class or collective basis. If under applicable law a representative claim under the [PAGA] is found to be unwaivable and such an action is pursued in court, I and the Company agree that any such PAGA claim will be **severed and stayed pending resolution of claims that are arbitrable.**”

Do I Need To Revise My Arbitration Agreement?

Some Arbitration Agreements require arbitration of class and representative claims.

Example # 2

- “Employee is required to submit to arbitration any and all controversies, claims, or disputes with the Company ***whether brought on an individual, group, or class basis***, arising out of, relating to, or resulting from his or her employment with the Company.”

Do I Need To Revise My Arbitration Agreement?

Some Arbitration Agreements do not apply to PAGA Claims.

Example # 3:

“All claims, disputes, or causes of action (“Claims”) must be brought solely in an individual capacity and will not be brought as a plaintiff or class member in any purported class or representative proceeding, nor joined or consolidated with the claims of any other person ... Claims **not** covered by this Agreement are claims brought ... ***pursuant to the California Private Attorneys General Act (PAGA.)***”

ISSUE ON THE HORIZON





May I Request Agreement To Arbitrate As A Condition of Employment?

Labor Code § 432.6 (AB 51)

- Labor Code § 432.6 was to go into effect on January 1, 2020.
- Prohibits employers from requiring employees (or applicants) to sign arbitration agreements as a condition of employment (or continued employment).
 - Applies to arbitration agreements that waive right to file civil action under FEHA or the Labor Code.
 - Opt Out clause are deemed a condition of employment.
- Prohibits employers from threatening, retaliating against, discriminating against or terminating an employee (or applicant) for refusing to enter into an arbitration agreement.
- Applies only to agreements entered into, modified or extended on or after January 1, 2020.

Chamber of Commerce v. Bonta (2021)

13 F.4th 766

- **The Chamber of Commerce challenged the law, and a federal court granted a preliminary injunction.**
- **Ninth Circuit held FAA does not preempt AB 51 and vacated the preliminary injunction.**
 - It regulates conduct *before* the agreement is made, which does not fall within the scope of the FAA.
 - It does not invalidate or hinder existing arbitration agreements already governed by the FAA.
 - Chamber of Commerce filed a petition for rehearing
- **Ninth Circuit deferred consideration of petition until after *Viking River Cruises* decision.**

Employer Takeaways

- Employers should consider converting to *voluntary* arbitration agreements, which means allowing employees (or applicants) to decline to participate without any penalty.
- Employers should consider removing opt-out clauses from arbitration agreements.
- Employers should consider creating standalone arbitration agreements and removing arbitration clauses from onboarding documents (*i.e.*, handbooks, employment applications, etc.)
- This does not affect arbitration agreements entered into prior to January 1, 2020.
 - No need to modify or execute new agreements if valid pre-2020 agreement exists.

New Wage and Hour Class and PAGA Decisions



UPDATE

FROM JANUARY 2022 SEMINAR



Naranjo v. Spectrum Security Services, Inc. (May 2022)

13 Cal.5th 93

Security Officer filed putative class action alleging violations of meal break requirements.

- Employee sought:
 - Premium pay for meal break violations.
 - Waiting time penalties.
 - Premium pay to be designated as wages reportable on wage statements.
 - Trial court award of prejudgment interest rate of 10% pursuant to Cal. Civ. Code §3289(b).



Naranjo v. Spectrum Security Services, Inc. (May 2022)

13 Cal.5th 93

- “Missed-break premium pay is indeed wages subject to the Labor Code’s timely payment and reporting requirements, and it can support section 203 waiting time penalties and section 226 wage statement penalties where the relevant conditions for imposing penalties are met.”
- 7% default rate set by the state Constitution is the proper prejudgment interest, not 10% interest rate for contract claims under Cal. Civ. Code §3289(b)



Employer Takeaways

- Compliance with meal and rest break laws has never been more important.
- Premium pay for meal and rest break violations constitute wages and must be reported on wage statements.
- Premium pay triggers waiting time penalties.
- Derivative penalties for waiting time violations will increase awards for meal and rest break violations.



NEW WAGE AND HOUR DECISIONS IMPACTING CALIFORNIA EMPLOYERS



Hill v. Walmart Inc. (9th Cir. 2022)

32 F.4th 811



- Worker modeled for Walmart for a total of 15 days over a year.
- Reasonable for Walmart to believe worker was an independent contractor due to the limited and irregular nature of her work .
- A good-faith defense may succeed against claims for waiting time penalties, when Employer has reasonable and good faith dispute over the employment status of a worker.

Estrada v. Royalty Carpet Mills, Inc. (March 23, 2022)

76 Cal.App.5th 685

- A court cannot strike a PAGA claim based on manageability
 - Conflicts with *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746.
 - Courts may limit the amount of evidence PAGA plaintiffs may introduce at trial.
 - Encouraged counsel to define a workable group of aggrieved employees for which violations can more easily be shown, such as “employees at a single location or department.”
- California Supreme Court granted review:
 - Do trial courts have inherent authority to ensure that claims under PAGA will be manageable at trial, and to strike or narrow such claims if they cannot be managed?

ISSUE ON THE HORIZON

What Constitutes Compensable “Hours Worked”?



Huerta v. CSI Electrical Contractors, Inc.

(9th Cir., July 8, 2022) 2022 WL 2570676

Ninth Circuit Certified three questions to the California Supreme Court:

- 1) Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as “hours worked”?
- 2) Is time spent on the employer’s premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as “hours worked” or as “employer-mandated travel”?
- 3) Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as “hours worked” when that time was designated as an unpaid “meal period” under a qualifying collective bargaining agreement?

Boone v. Amazon.com Services., LLC (E.D. Cal. 2022) 562 F.Supp.3d 1103

- Plaintiffs claimed that Amazon failed to compensate employees for time spent undergoing COVID-19 symptom screenings before the beginning of each of their shifts.
- Employees sufficiently alleged that they were subject to employer's control when they spent time awaiting and undergoing COVID-19 screening checks such that time constituted "hours worked."



Johnson v. WinCo Foods, LLC (9th Cir. June 13, 2022) 37 F.4th 604

- Employer did not have to compensate for time plaintiffs spent on pre-employment drug tests.
- Pre-employment drug tests constitute a "condition precedent" to hiring.

Questions?

Thank you for attending this program, for further information regarding this topic please reach out to:



Josue Aparicio

T: 415-995-5094

JAparicio@hansonbridgett.com



Winston Hu

T: 415-995-6483

WHu@hansonbridgett.com



Maribel Lopez

T: 415-995-6332

MLopez@hansonbridgett.com

Remote Workplace vs. In-Person Workplace – Risks and Rewards



Gilbert Tsai
Partner; San Francisco Market Leader
T: 415-995-5874
gtsai@hansonbridgett.com



Alfonso Estrada
Labor & Employment Section Co-Leader
T: 213-395-7633
aestrada@hansonbridgett.com



Is Remote Work Here to Stay?

County	Share of Remote Eligible Jobs	Remote Eligible Jobs
San Francisco	51%	391,248
Santa Clara	51%	569,941
San Mateo	47%	195,218
Sacramento	40%	316,655
Orange	39%	642,799
Marin	39%	45,013
Contra Costa	38%	140,781
Los Angeles	38%	1,708,733
Sonoma	32%	67,926
http://www.bayareaeconomy.org/report/remote-work-in-the-bay-area/		

Why Yes, Yes It Is...

- According to a November 2021 survey, employed Californians fall into three groups.

Current Percentages	
61%	At the workplace/outside the home
22%	Exclusively working from home/remote
15%	Hybrid (home/workplace)

- Preference:

Preferred Arrangements	
42%	At the workplace/outside the home
24%	Exclusively working from home/remote
33%	Hybrid (home/workplace)

- <https://www.ppic.org/blog/californias-workplaces-today-and-tomorrow/>

Agenda

To discuss:

- Positive aspects of remote work
- Managing remote employees
- State/local laws apply
- Wage and hour issues
- Reimbursement issues
- Workplace safety
- Separating from remote workers
- Being prepared

Positive Aspects to Remote Work



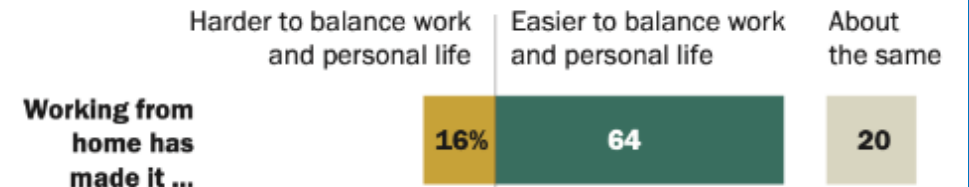
Employee Satisfaction

- According to a Pew Research poll:
 - 64% of remote employees say they are able to balance work and personal life easier
 - Greater control of work environment
 - Easier to work on individual projects.
 - 78% of workers who are currently remote want to stay remote

<https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/>.

For workers who've made the switch to teleworking, most have found more balance but less connection with co-workers

Among employed adults who rarely or never worked from home before COVID-19 and are working from home at least some of the time now, % saying ...



Recruiting/ Retention

- Employer and employee benefits:
 - Reduced overhead
 - Greater flexibility
 - Broader hiring pool
 - Salary considerations
 - Impact on productivity
 - Corporate profits



Most Remote-Eligible Jobs

Job	Percentage of Remote Eligible Workers
Sales representatives, wholesale and manufacturing, technical and scientific products	83.60%
Market research analysts and marketing specialists	63.60%
Software developers	62.80%
Computer network architects	62.40%
Lawyers	60.80%
Fundraisers	60.70%
Computer programmers	59.90%
Sales managers	56.30%
Systems Analysts	54.70%
Source: Bureau of Labor Statistics	



Managing Remote Employees

Communications

- Training for virtual communication platforms.
- Employers and employees will need to adjust to a hybrid model of communication.
- Drawbacks include less transfer of institutional knowledge, and reduced engagement and training.

Clear Goals/ Deadlines

- Setting and enforcing clear goals and deadlines is challenging during remote work.
- Ensure employees are performing as well as they would in an office setting.
- Monitoring employees' software is one potential solution.

Productivity/ Tracking Technology?

- Monitoring allows employers to make sure employees are meeting deadlines.
- Employees can also see how they perform relative to their colleagues.

Performance Tracking Technology AKA “Tattleware”

- Track keystrokes
- Measure active v. idle time
- Track time on particular tasks
- Track website use
- Take photos to see if employee is working from his/her computer
- Taken screenshots at random intervals
- Give reminders when on non-work websites
- Generate reports of websites visited and for how long

Monitoring Productivity – Survey Says...


- 60% of companies with remote workers are using monitoring software to track employee activity and productivity
 - Among “monitored” employees 53% are spending 3 or more hours per day on non-work activities
 - 88% of employers terminated workers after implementing monitoring software
 - 81% of companies that implemented monitoring software saw an increase in worker productivity
- Source: September 2021 survey of 1,250 U.S. employers by Digital.com

Performance Monitoring Technologies

- Zoom/Slack
- Trello
- Time Doctor
- Toggl
- RescueTime
- Timely
- Harvest
- Everhour
- Timeneye
- ClickTime

Impact on Morale

- Reasonable Expectation of Privacy
- Use of employee personal hardware for company software



Employers are subject to
state/local laws where
employees work

Tax Laws

- Employers must withhold federal income tax, Social Security and Medicare taxes, pay FICA and Federal Unemployment Tax (FUTA)
- Most states require employers to pay various types of payroll taxes, such as contributions to unemployment or disability insurance benefits.
- For workers in different states, employer must withhold employees' state and potentially local income tax

Leave Laws

Paid Family Leave: Eleven states offer paid family medical leave

- California, Colorado, Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, Oregon, Rhode Island, Washington—and the District of Columbia

Paid Sick Leave: Sixteen states and the District of Columbia require employers to provide paid sick leave

School/Parental Leave: Some states require limited number of unpaid hours for parents to attend school-related events and activities for children.

- California requires the most, 40 hours



Non-Compete Agreements

- California law prohibits non-compete agreements: “...every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” Business and Professions Code Section 16600.
- Some states ban non-compete agreements for low wage or hourly workers
 - E.g., Nevada, Oregon, Washington, Illinois, Virginia...
- However, many other states allow non-competes
 - E.g., Colorado, Utah, Texas, Florida, Georgia...



Paid Time Off

- California expressly prohibits “use it or lose it” policies, and requires payout of accrued, unused vacation upon separation.
 - Vacation time = wages
 - In most other states, the employer’s policy governs treatment of vacation time as “wages”



COVID-Related Leaves

- California provided 80 hours of “COVID-19 related paid leave” in 2021 and 2022
 - Other states provided similar (but less generous) leaves, e.g., Colorado, Massachusetts, New York.
 - Several states provided leaves to encourage employee vaccination
 - Local jurisdictions also passed leave laws. E.g., Chicago required up to four (4) hours of paid leave per vaccine appointment.

Independent Contractor Arrangements

- California adopted the ABC test to determine whether a worker was a true independent contractor:
 - A. The person is independent of the hiring organization in connection with the performance of the work (direction and control)
 - B. The person performs work that is outside the hiring entity's business.
 - C. The person is routinely doing work in an independently established trade, occupation, or business.

Not so in most other states.



Anti- Discrimination / Anti- Harassment Laws

- Employers will need to observe state and local laws that may be unique for each jurisdiction.
- E.g.,
 - City and County of San Francisco prohibits discrimination on the basis of height and weight;
 - City of Santa Cruz prohibits discrimination based on any physical characteristic, including “individual mannerism”
- Is COVID a disability? A federal district court recently noted: “for some individuals COVID-19 can cause exceedingly severe, even deadly, symptoms with long durations that would easily qualify as a FEHA disability.” *Roman v. Hertz Local Edition Corp.* (S.D.Cal., May 16, 2022)

Wage and Hour Issues

Work Schedule

- Tracking compensable time for hourly employees
- Providing meal and rest periods for hourly employees
 - How to ensure duty-free meal periods?

Managing “Off the Clock” Work

- Under the Industrial Commission’s Wage Orders, to employ an individual includes “to suffer or permit to work”
- “The basis of liability is the defendant’s knowledge of and failure to prevent the work from occurring.”
- Prohibit – but pay for – “off the clock” work
- Require managers to review time records
- Falsification of time records as grounds for termination

Pay Localization Issues

- How to pay employees who move to areas with a lower cost of living?
 - Maintain existing pay structures?
 - Reduce pay for areas with a lower cost of living?
 - How to define geographic areas?
- Note SB 1162 would require pay transparency in California.



Reimbursement Issues

Labor Code 2802

- Private employers must reimburse employees for expenses necessary to complete work.
- *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137 (2014). If equipment or technology is required, the employer must pay “some reasonable percentage” of the bill – regardless of whether employee incurred any extra expense.

“Mandatory” Remote Work Expenses

- Phone and Data Plan
- Internet
- Computer
- Teleconferencing Equipment or Software
- What else is “reasonable and necessary”?

Case Law

- In *Williams v. Amazon.com Services LLC*, a federal district court (Northern District of California) disagreed with two arguments raised by Amazon as defenses to reimbursement claims:
 - Amazon’s compliance with stay-at-home orders absolved them of liability, and
 - The plaintiff did not submit reimbursement requests to Amazon so they could not know that he incurred reimbursable work-related expenses.
- The employee’s duties “plausibly requires the use of physical space, internet, and electricity.”
- The company “surely knew or at the very least had reason to know” the basic costs of working from home.

Pushing the Envelope?

- Physical Space?
- Payment for potential revenue of a home office or ADU?
- Furniture?
- Lighting?



Itemized v. Remote Work Allowance

- Both have risks and rewards.
- Employees may be eligible to receive tax deductions for remote work according to IRS publication 587.

Travel Time

- Because employees' homes are the workplace, employers are required to compensate hourly workers (and reimburse) fully remote employees for trips to the office.



Workplace Safety

Workers Compensation

- Remote workers are covered under workers' compensation if the injury arises out of or in the course of employment.
- **Personal comfort doctrine:** acts performed during work that are necessary for the personal comfort, convenience, or welfare of the employee, are within the course and scope of employment.
 - Going to the restroom, getting water or coffee, lunch breaks
- They are necessary and customary, and part of “normal working conditions”

Personal Activities

- If the activity is strictly for personal purposes, they are not within the course of employment.
 - The activity is not incidental to the employment.
 - There is no employment-related benefit to the employer.
- *Santa Clara Valley Transportation Authority v. Workers' Compensation Appeals Board (Tidwell)* (2017) 82 Cal. Comp. Cases 1514.
 - Fell in the bathroom while working at home. Covered?

OSHA and Cal/OSHA

- Requires employers to provide “safe and healthy workplace,” even if the workplace is in the employee's home
- Home inspections highly unlikely
- COVID-19 emergency temporary standards (ETS) do not apply at home.



Separating From Remote Workers

Final Paycheck

- California employees must receive their final checks 72 hours after resignation.
- If a remote employee is fired in-person, an employer may need to pay for time and expenses incurred as a part of the employee's trip to the office.
- Immediately if terminated remotely.

Retrieving Company Equipment

- Employers cannot withhold pay from separated remote employees who have yet to return company equipment.
- Consider whether employees may keep equipment purchased by employees using company reimbursement.

Being Prepared

Establish Clear Remote Policies

- Determine which categories of employee are remote-eligible
- Telecommuting as a reasonable accommodation
- Supervisor discretion?
- Update handbooks
- Dress code?
- Zoom etiquette?

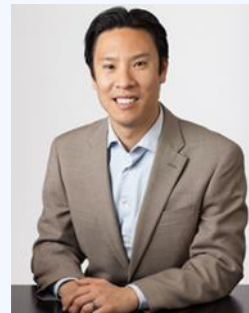


Digital files

- Employers should digitize necessary hard copy files for their remote employees.
- Digitizing hard copy files also makes collaboration between remote and in-person employees much easier.
- Having these files available in digital form can also help employers monitor employees' productivity (especially if employees and employers can view and edit files simultaneously).

Questions?

Thank you for attending this program, for further information regarding this topic please reach out to:



Gilbert Tsai

Partner; San Francisco Market Leader

T: 415-995-5874

gtsai@hansonbridgett.com



Alfonso Estrada

Labor & Employment Section Co-Leader

T: 213-395-7633

aestrada@hansonbridgett.com

On the Horizon: New Employment Laws/ Prospective New Laws



Sandy Rappaport

Partner

T: 415-995-5053

srappaport@hansonbridgett.com



Alexa Galloway

Associate

T: 213-839-7714

agalloway@hansonbridgett.com



Alison Wright

Business Section Leader

T: 415-995-5083

AWright@hansonbridgett.com



COVID-19 Updates – ETS Revisions

- Cal/OSHA updated the Emergency Temporary Standards (ETS)
 - Effective May 6, 2022 through December 31, 2022
- Definitions updated
 - “Close Contact & Infectious Period”
 - “COVID-19 Test”
 - “Fully Vaccinated”
- Requirements eliminated
 - Cleaning and disinfecting
 - Partitions/ barriers

COVID-19 Updates – Revised ETS: Face Coverings

- No longer required for employees regardless of vaccination status, unless otherwise established by CDPH or local guidelines.
- Exceptions:
 - Emergency Shelters
 - Cooling/Heating Centers
 - Healthcare Facilities (Incl. Long Term and Senior Care Facilities)
 - Correctional Facilities and Detention Centers
 - Homeless Shelters
- Masks must still be provided upon request

COVID-19 Updates – Revised ETS: Employees Who Test Positive for COVID-19

- Regardless of vaccination status, employees may return after 5 days if:
 - Negative test
 - Symptoms improving
 - Wear face coverings for 10 days
- Otherwise: employee can return after 10 days if no fever
- Employees must have access to testing

ETS Standards Still In Effect

- Implementation of COVID-19 Prevention Program & effective training and instruction
- Notifying:
 - Public Health Department of Outbreaks
 - Notifying Employees of Potential Exposure/ Close Contact
- Offering Testing After Exposure
- Responding to COVID-19 Cases and Outbreaks
 - New CDPH definition of “close contact”
 - Someone sharing the same indoor airspace (e.g., home, clinic waiting room, airplane etc.) for a cumulative total of 15 minutes or more over a 24-hour period during the COVID-19 case’s infectious period.
- Isolation and Exclusion Pay Requirements

Workers' Compensation Presumption (SB 1159)

- Effective through January 1, 2023
- Presumption applies to:
 - First responders
 - Health care workers
 - Employees who test positive during a workplace outbreak
 - 100 employees or fewer: four employees test positive
 - >100 employees: 4% of those who reported to the workplace
 - Place of employment was ordered to close
- Notify workers' compensation carrier of positive cases within 3 business days

Minimum Wage - California

- In 2022:
 - 25 or more employees: \$15
 - 24 or fewer employees: \$14
- Starting January 1, 2023:
 - \$15.50 regardless of number of employees

City	Previous Minimum Wage	Current Minimum Wage (as of 7/1)
Alameda	\$15	\$15.75
Berkeley	\$16.32	\$16.99
Emeryville	\$17.13	\$17.68
Fremont	25 Employees or Fewer: \$15 26 Employees or More: \$15.25	\$16
Los Angeles County (Unincorporated)	\$15	\$15.96
Malibu	\$15	\$15.96
Milpitas	\$15.65	\$16.40
Pasadena	\$15	\$16.11
San Francisco	\$16.32	\$16.99
Santa Monica	\$15	\$15.96

Foster City - Minimum Wage Ordinance

- In 2022:
 - 25 or more employees: \$15
- July 1, 2022: \$15.75
- January 1, 2023: \$16.50
- Starting January 1, 2024, increases will be determined by the Regional CPI, but will not exceed 3%

City of Los Angeles – Minimum Wage

- Previously: \$15
- As of July 1: \$16.04
- Hotel employees at properties with 150 or more rooms: \$18.17

City of Long Beach - Minimum Wage

- Los Angeles County July 1 increase does not apply
- Follows state's \$14/\$15 requirement until January 1, 2023
- Exceptions
 - Hotel Workers - \$16.73 as of July 1, 2022 (previously \$15.69)
 - Concessionaire Workers - \$16.55 as of July 1, 2022 (previously \$15.32)

West Hollywood Ordinance

- 49 or fewer employees: \$16 as of 7/1/22, \$17 as of 1/1/23, \$18.86 as of 7/1/23
- 50 or more employees: \$16.50 as of 7/1/22, \$17.50 as of 1/1/23, \$18.86 as of 7/1/23
- Hotel employees: \$18.35 as of 7/1/22, 18.86 as of 7/1/23
- One-time, one-year waiver if requirements would force the business to:
 - File bankruptcy or shut down; or
 - Reduce its workforce by more than 20%; or
 - Cut employee hours by more than 30%
- Updated Guaranteed Leave Policy (effective July 1, 2022):
 - Full-time employees must be provided with at least 96 compensated hours and 80 uncompensated hours for sick leave, vacation, or personal necessity
 - Part-time employees must be provided proportional leave
 - Up to two three-month waivers available if compliance would cause implementation hardship due to existing payroll and HR processes and platforms

Overtime Wages & Hours for Agriculture Workers

- Workers of employers with 25 or fewer employees
 - Now: receive overtime after 9.5 hours per day/55 hours per week
 - January 1, 2023: overtime after 9 hours per day/50 hours per week
 - January 1, 2024: overtime after 8.5 hours per day/45 hours per week
 - January 1, 2025: overtime after 8 hours per day/40 hours per week
- Workers of employers with 26 or more employees
 - Overtime after 8 hours per day/40 hours per week

Public Employee Communication – Gov. Code Section 3556

- Amended June 30, 2022
- Amendments:
 - Entitles exclusive representative access to new employees during on-site in-person meeting
 - Representative entitled to communicate directly with newly hired employees
 - New employees are relieved of all duties to attend meeting
 - Employer must provide appropriate on-site meeting space within 7 calendar days of receiving request

San Francisco Regulations

- Permanent Public Health Emergency Leave (PHEL)
 - Effective October 1, 2022
 - Employees will be offered a paid leave at the onset of a “public health emergency”
- Family Friendly Workplace Ordinance (FFWO)
 - Effective July 12, 2022
 - Provides legal protection for employees who serve as a caregiver for family members, including those 65 and older
 - Covers employees who work remotely outside of SF for a SF employer

AB 1221- Responsible Beverage Service Training Program Act

- Effective July 1, 2022
- Any on premises alcohol server and manager must:
 - Be certified by an accredited RBS training provider
 - Pass an ABC exam within 60 calendar days from the first date of employment.
 - For existing employees hired before July 1, deadline for certification is August 31, 2022
- Employers must reimburse for hours spent for training and any incurred expenses (pursuant to Labor Code section 2802)

California Consumer Privacy Act (CCPA)

California Privacy Rights Act (CPRA)

- Covered businesses that do business in California
 - Gross revenue of over \$25M; or
 - Sell, receive or share personal information of at least 50K California residents, households or devices for commercial purposes; or
 - Derive 50% of their annual revenue from selling California residents' personal information
- CPRA/CCPA training – by January 1, 2023
 - Companies must provide training to any employee who may receive an inquiry regarding privacy practices
 - Training to include consumer rights, how consumers can exercise their rights, and how the business should respond to inquiries

Other Laws Close to Enactment/ Keep an Eye Out For

- AB 2183: Agricultural Labor Relations Voting Choice Act
- AB 2188: Drug-Free Workplace Amendment
- AB 2756: Fast Food Accountability and Standards (FAST) Recovery Act
- SB 1044: Attendance During a State of Emergency
- SB 1162: Publication of Pay Data

Post-Roe Medical Travel Policy

- Many employers have pledged to assist employees with travel expenses in response to the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*.
- Considerations for employers:
 - Benefit design
 - Group health plan compliance
 - ERISA
 - COBRA
 - Affordable Care Act
 - Mental Health Parity and Addiction Equity Act

Post-Roe Medical Travel Policy, continued

- Considerations for employers:
 - High deductible health plans
 - ERISA preemption of state laws
 - Tax consequences
 - Privacy issues
 - Administrative practicalities

Our employee benefits group can assist!

Questions?

Thank you for attending this program, for further information regarding this topic please reach out to:



Sandy Rappaport

Partner

T: 415-995-5053

srappaport@hansonbridgett.com



Alexa Galloway

Associate

T: 213-839-7714

agalloway@hansonbridgett.com



Alison Wright

Business Section Leader

T: 415-995-5083

AWright@hansonbridgett.com

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